

Inland Container Corporation and United Paperworkers International Union, AFL-CIO & CLC, Local No. 522. Case 17-CA-10772

13 September 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 27 January 1983 Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party Union filed exceptions and supporting briefs, and Respondent filed an answering brief to their exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The Charging Party Union has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the section of his Decision entitled "The Facts," seventh paragraph, next to last sentence, the Administrative Law Judge states that "[t]wenty production and maintenance employees were hired, and reported to work on November 9, 1981." The record evidence discloses, however, that Respondent only made job offers to 20 applicants, that 17 of them accepted employment, and that 16 employees reported for work on that date. We find that this correction is not sufficient to affect the results of this case.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Kansas City, Missouri, on October 13 and 14, 1982. The initial charge was filed on January 4, 1982, by United Paperworkers International Union, AFL-CIO & CLC, Local No. 522 (herein called the Union).

Thereafter, on April 27, 1982, the Regional Director for Region 17 of the National Labor Relations Board (herein called the Board) issued a complaint and notice of hearing alleging a violation by Inland Container Corporation (herein called the Respondent) of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act). The complaint was amended on June 24, 1982.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for the Respondent, and counsel for the Union.

Upon the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation, engaged in the manufacture, distribution, and sale of corrugated containers at various facilities including a facility located in Kansas City, Kansas. In the course and conduct of its business operations within the State of Kansas, the Respondent will annually purchase goods and services valued in excess of \$50,000 directly from sources located outside the State of Kansas, and will annually sell goods and services valued in excess of \$50,000 directly to customers located outside the State of Kansas. It is admitted, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issue raised by the pleadings is whether the Respondent, upon commencing operations at its Kansas City, Kansas, plant, violated Section 8(a)(3) of the Act by discriminatorily refusing to consider for hire, and by refusing to hire, the employees of the predecessor employer at that location because of their union affiliation.

B. The Facts

On August 14, 1981, the Respondent purchased a corrugated box manufacturing plant, located in Kansas City, Kansas, from International Paper Company. International Paper ceased operations on August 28, 1981, on which date it terminated its 60 employees who had been continuously represented by the Union or its predecessors since 1946.

The Respondent took possession of the facility and equipment on September 2, 1981, and began to staff and

renovate the plant in preparation for the commencement of production operations. The higher managerial personnel, namely, the plant manager, production manager, and maintenance supervisor, were transferred to the Kansas City, Kansas, facility from other of the Respondent's operations. These individuals, in turn, hired the supervisory staff, including three former supervisors who have been recently terminated by International Paper. Warren Gilreath, the Respondent's senior vice president, operations support, testified that these three supervisors were hired because the Respondent did not have sufficient personnel who could be transferred to the particular positions and, with regard to one of them, the corrugator foreman, it was beneficial to employ a person with familiarity with the corrugator machine which, it appears from the record, is the very basis for the production operation. Upon being hired, the supervisors underwent a full week's training and orientation program conducted by individuals from the Respondent's corporate headquarters, including personnel from technical services, quality, safety, and supervision training.

Janet Dudley, former employee relations supervisor for International Paper, was hired by the Respondent on September 14 to perform substantially the same function for the Respondent as she had previously performed for International Paper. She, in turn, hired four former salaried employees for International Paper to perform clerical and administrative work. Further, she was directed by David J. Harrison, vice president, employee relations staff services, to commence hiring hourly employees, and was given specific instructions (*infra*) in this regard.

At the present time, the Respondent owns and operates 28 corrugated box plants. Eighteen are represented by various locals of the International Union involved herein and two are represented by other unions. Eight plants remain unrepresented. The record shows that, since 1971, the Respondent has commenced operations in approximately 12 box plants, including the Kansas City, Kansas, plant. Four of the plants¹ were new operations with no prior work force. The remainder of the plants, except for the Kansas City, Kansas, plant, were existing operational box plants which the Respondent commenced to operate on an uninterrupted basis subsequent to their acquisition. Regarding these latter seven plants, the record shows that the Respondent purchased the entire business operations of the predecessors, including raw materials, finished goods, work in process, and sales and order books. In these instances, the Respondent hired the existing employee complement and assumed various bargaining obligations, essentially continuing the predecessor's business operations.

The purchase of the Kansas City, Kansas, plant was unique in that International Paper did not desire to sell the plant as an ongoing business. Rather, it intended to remain in the market and compete by supplying its customers in the area from other plants. Thus, the Respondent was able to purchase only the plant and equipment from International Paper. Having no orders to fill or customers to supply, the Respondent determined that it would be beneficial to hire an inexperienced work force.

This method of staffing its four new operations, *supra*, had been quite successful. Thus, the Crawfordsville, Indiana, plant which opened in 1972 with a new inexperienced work force, had become, according to the testimony of David Harrison, the premier box plant operation among all of the Respondent's plants. Harrison attributed this, in major part, to the fact that such employees, after proper training in the Respondent's production methods, proved to be more efficient and productive than the experienced employees in the Respondent's other facilities. According to the Respondent's senior vice president, operation support, Warren Gilreath, four of Respondent's top six box plants in terms of productivity are the plants which were new "start-up" operations, with no prior work force. While it appears that three of the Respondent's startup plants were in areas where no experienced employees would readily be found, as there were no box plants in these locations, the record shows that at one location there were several box plants, and that the Respondent refused to hire employees who had had prior experience in the industry.

Harrison and other managerial people jointly decided, in September 1981, to staff the Kansas City, Kansas, plant with an inexperienced work force. The rationale for this, according to Harrison, was that such employees, with no preconceived ideas or opinions about methods of manufacturing boxes, could be more readily trained in efficient production methods, and also could be more easily cross-trained to perform a variety of jobs as needed. Premised on this rationale, the Respondent established three criteria for the hiring of hourly employees, namely, a preference for employees who had had possibly 2 years or more of some factory or industrial experience; a preference that the employees have a high school education; and an absolute prohibition against hiring any hourly employees with previous box making experience for any box manufacturer.

With these instructions, Janet Dudley, office manager and employee relations supervisor, began hiring a work crew. On September 25, 1981, she began interviewing the some 265 applicants. Of the applicants, 37 had had previous box experience and 22 of the individuals had worked in the Kansas City, Kansas, plant of International Paper. Each of these 37 applicants was automatically rejected, Dudley explaining to them that they were eligible to be hired because of their prior experience. This included Norman Steinmetz, the union president and senior maintenance man who had been employed by International Paper for 37 years, who, according to Dudley's knowledge, was clearly qualified for a maintenance job which Dudley had considerable difficulty in filling. The interviewing was completed in mid-October 1981. Twenty production and maintenance employees were hired, and reported to work on November 9, 1981. The plant started up on November 16, 1981.

During the period between the Respondent's purchase of the plant and its startup, the Respondent spent approximately \$2-1/4 million for renovation of the plant and machinery, particularly the corrugator machine.

Gene Aubuchon is an International representative for United Paperworkers International Union. Aubuchon tes-

¹ Crawfordsville, Indiana, 1972; Hazelton, Pennsylvania, 1976; Ft. Smith, Arkansas, 1978; and Garden City, Kansas, 1981.

tified that on or about September 10, 1981, during a grievance meeting with Labor Relations Manager Howard Acker, on an unrelated matter pertaining to a plant in Glendale, Wisconsin, he mentioned to Acker that he was disturbed about the Company's decision not to hire union members at the Kansas City, Kansas, plant. Acker, according to Aubuchon, replied that it was not his decision, and that the Company wanted to hire all new people who had no previous corrugated box experience and train them from the ground up. During the course of the meeting, Aubuchon again brought up the subject, stating that in his opinion "the only reason that the Company would not hire our people in Kansas City was because they didn't want the Goddam union in that plant." Acker said, "That's right, Gene, we don't want a union in that plant."²

Again, on October 1, at the same location, Aubuchon and four other union representatives were present for a meeting with company representatives, including Acker. Aubuchon refused to shake hands with Acker because of the Kansas City, Kansas, situation. Later, Acker told Aubuchon that he was offended by his conduct. Acker again explained, according to Aubuchon, that he had nothing to do with the decision not to hire any International Paper employees, and that the Company wanted to train employees from the ground up.

Acker testified that he has never had any responsibility whatsoever for the Kansas City, Kansas, plant. In July 1981, he had knowledge that the Company was interested in a plant in Kansas City, but had no information as to how the plant would be staffed. Nor did he acquire such knowledge until sometime between October 1 and November 18, 1981.

Acker testified that he met with Aubuchon and Dennis Schick, local union president, on September 10, 1981, regarding a plant in Glendale, Wisconsin. According to Acker, there was no mention whatsoever of the Kansas City, Kansas, plant. On September 10, 1981, he knew only that the Respondent had purchased the plant, reading of this acquisition in a company notice and newsletter.

Acker did testify that on October 1, 1981, at a meeting, Aubuchon refused to shake Acker's hand, stating, "I don't shake hands with Inland Management that does the things that you did at Kansas City." Acker replied that he has never had anything to do with the Kansas City, Kansas, plant. Nothing else was said. Acker, at the time, still had no knowledge of how the Kansas City, Kansas, plant would be staffed. Thereafter, at meetings on November 19 and December 8, 9, and 11, 1981, Aubuchon repeatedly expressed his indignation over the Respondent's failure to hire the former employees of International Paper at the Kansas City, Kansas, plant. Acker testified that at no time did he say the staffing decision was for the purpose of precluding a bargaining relationship with the Union.

² Aubuchon's affidavit, dated January 17, 1982, states that he told Acker "That I understand they wanted no union in that K.C. plant." Acker answered, "That's right we don't want a union in that plant." There is no mention in the affidavit that Aubuchon stated, or that Acker acknowledged, that the "only reason" for the Respondent's failure to hire the predecessor's employees was to avoid having a union in the plant. Further, Aubuchon's affidavit states that this conversation with Acker occurred in December 1981 rather than September 1981.

Joe Bradshaw, vice president and regional director of region 7 of the International Union, testified that on August 24, 1981, he phoned Charles Holloway, the Respondent's general manager of corporate relations, and inquired about the Respondent's intentions regarding the Kansas City, Kansas, plant.³ Holloway acknowledged that the Company had acquired the plant, although the final documents had not been signed, and that the Company did not intend to hire the former employees because they had "bad habits." Bradshaw then asked, specifically advising that the remainder of the conversation would be "off the record," what the Company's intentions were. Holloway replied, according to Bradshaw, "Old Dude, what we intend to do is keep the plant down for one month. We're going to start the plant with non-union and we're going to run the plant non-union." Holloway then reiterated that the Company did not want to hire any of the former employees because of their "bad habits," but rather wanted to hire and train inexperienced employees, adding that, if the Union would come out there and sign them up and win an NLRB election, the Company would sit down and negotiate a contract. A few days later, Bradshaw again called Holloway and asked whether the Company would be willing to negotiate some kind of settlement of the matter. Holloway said no, and reiterated the Company's position.

Holloway, called as a witness by the Union, did not contradict Bradshaw's testimony. The Respondent's counsel asked Holloway no questions about his conversations with Bradshaw.

Donald Woodall is an International representative. Woodall testified that during later July or early August 1981, no later than August 14, in Hattiesburg, Mississippi, Woodall had a conversation in his hotel room with George Applegate, a labor relations manager for the Respondent. They talked about a number of things and Applegate informed Woodall that the Company had purchased the Kansas City, Kansas, plant, and had no intentions of hiring any of the former International Paper employees. Applegate added, according to Woodall, that the reason for this was that the Company did not want a union in the plant. Applegate went on to say that he did not agree with this and had argued with his supervisors about the matter; that he did not think it was right for the employees in Kansas City; and that he felt the Company would not get by with it if charges were filed with the NLRB.

Woodall made no notes of the conversation. His affidavit submitted to the Board states that during the conversation "Mr. Applegate stated that International Paper Company had shut his plant down some time ago and laid all of the employees off and that Inland had plans to put the plant back into operation but was not going to employ any of the bargaining unit employees that had been employed by International Paper Company." Woodall testified that after this conversation he does not recall discussing the matter further with Applegate.

Applegate testified that he had never had any responsibilities with respect to the Kansas City, Kansas plant,

³ Bradshaw's affidavit in two different places states that the initial conversation with Holloway was in September 1981.

and did not know about the purchase of the plant until reading a company notice dated September 3, 1981. Moreover, he first learned the plant would be staffed by new employees in October 1981, when he was informed of the NLRB charges. Applegate testified that he had no discussions with Woodall concerning the acquisition or the staffing of the Kansas City, Kansas, plant in July or August 1981.

Applegate testified, however, that on February 1, 1982, he received an unusual call from Woodall, ostensibly to discuss a grievance at the Hattiesburg plant. At the conclusion of the discussion, according to Applegate, Woodall stated that the International was asking various representatives whether or not they had any conversations with any Inland people concerning Kansas City. Woodall then stated that he had informed his boss that he had asked Applegate about it, and that Applegate had given him certain information about the matter. Applegate responded that he did not know "what the hell" Woodall was talking about. Woodall then asked if there was a person named Acker in the office. Applegate said yes, and Woodall said, "Well, he has also been quoted."

Woodall testified during his cross-examination that he did not recall discussing the matter with Applegate except during the one instance in July or August 1981. He was not recalled, in rebuttal, to deny or explain the February 1, 1982, conversation testified to by Applegate.

C. Analysis and Conclusions

The law is clear that a successor employer is under no obligation to hire all or any of the predecessor's employees, and that in order to establish a violation of the Act under such circumstances, discriminatory motivation for the failure to hire must be proved. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974); *Marriott Corp.*, 251 NLRB 1255, 1359 (1980); *Jim's Big M*, 264 NLRB 1124 (1982); *Macomb Block & Supply Co.*, 223 NLRB 1285 (1976).

The record demonstrates that the plant operation under International Paper was successful,⁴ and that the former employees, a large portion of whom had not only years but decades of faithful employment with International Paper, were highly qualified to perform the work which, despite renovation of the plant and overhaul and updating of machinery, was substantially similar to the work they had readily and successfully performed for years. Nor is there any evidence that these employees, who have been largely unable to find employment elsewhere, could not have been successfully trained or cross-trained in the "Inland way." To be sure the "bad habits" which the Respondent admittedly wanted to negate by hiring inexperienced employees, could be reasonably

characterized as merely an emphasis for the type of work performed under the rather structured constraints of a union contract.

Counsel for the Union, in his brief, cites numerous cases in which the Board has found a successor's refusal to hire the predecessor's employees violative of Section 8(a)(3) of the Act.⁵ However, in the cited cases it was found that there was either substantial evidence of union animus, lack of a convincing rationale for refusal to hire the predecessor's employees, inconsistent hiring practices, or overt acts or conduct evidencing as discriminatory motive.

In the instant case such indicia of discriminatory intent, I find, has not been demonstrated. This Respondent has dealt with the Union or other locals of the United Paperworkers International Union for many years, in numerous locations throughout the country, and there is no record evidence that the relationship has been volatile or that it has been marked by an intent on the part of the Respondent to undermine the various local unions in any respect.

The Respondent's rationale for its decision to hire an entirely inexperienced work force is not inherently implausible, even though the record indicates that at the time of the hearing the production per man hour is not as high as it was under the operation of International Paper. Thus, the record is clear that the Respondent has experienced a considerable degree of recent success with this method of staffing its operations. Moreover, there was no compelling business reason to hire experienced employees in Kansas City, given the fact that the Respondent was commencing operations in a new market area with no ongoing business relationships to maintain or customers to service. Nor do I consider the Respondent's hiring of some of International Paper's clerical or supervisory personnel to establish a critical inconsistency with the Respondent's rationale, as the clerical or administrative personnel are sufficiently divorced from the production process, and the record shows that the hiring of certain supervisors was accomplished not out of choice, but rather necessity, as no other supervisors from the Respondent's existing operations were available. Similarly, the fact that the Respondent in 1977 hired two production employees at its Hazelton, Pennsylvania, plant who had previously worked in other box manufacturing plants, is insufficient to show that the Respondent's rationale was merely pretextual. More troublesome is the Respondent's failure to hire Steinmetz and another individual, as the reasons advanced for hiring inexperienced production workers do not seem to apply to maintenance mechanics who repair and service equipment. However, I find the record evidence insufficient to show that these individuals alone were denied employment for discriminatory reasons.

⁴ However, the July 28, 1981, plant announcement to the employees by International Paper, states, in part:

SINCE KANSAS CITY IS ONE OF THE DIVISION'S ORIGINAL PLANTS, IT IS UNFORTUNATE TO HAVE TO MAKE THIS ANNOUNCEMENT. HOWEVER, NEARLY ALL OF US HAVE KNOWN FOR A LONG TIME THAT THE KANSAS CITY PLANT WAS NOT PRODUCING ACCEPTABLE EARNINGS. IT IS ONE OF OUR OLDER PLANTS. MANY OTHER CONTAINER DIVISION FACILITIES ARE MORE MODERN AND EFFICIENT—WITH LOWER MANUFACTURING COSTS.

⁵ *Foodway of El Paso*, 201 NLRB 933 (1973); *Macomb Block & Supply Co.*, 223 NLRB 1285 (1976); *Mason City Dressed Beef*, 231 NLRB 735 (1977); *Houston Distribution Services*, 227 NLRB 960 (1977); *Potters Chalet Drug*, 233 NLRB 15 (1977); *Crawford Container*, 234 NLRB 851 (1978); *Hudson River Aggregates*, 246 NLRB 192 (1979); *Love's Barbecue Restaurant No. 62*, 245 NLRB 78 (1979); *Fresno Townhouse*, 246 NLRB 1053 (1979).

Regarding the alleged statements made by representatives of the Respondent indicating discriminatory intent, I discredit the testimony of those union representatives to the extent it is inconsistent with the Respondent's witnesses. Particularly, I credit Acker, who appeared to be a very forthright witness, and find that he did not tell or imply to Aubuchon, whose affidavit was inconsistent with his testimony, that the reason for refusing to hire International Paper's employees was to keep the Union out of the plant.

Regarding the "off the record" discussion between Bradshaw and Holloway, I find that this conversation, as described by Bradshaw, supports and enforces the Respondent's consistent position that its decision was motivated by valid business reasons rather than discriminatory intent. Thus, the Respondent intended to start up the plant after a period of renovation and updating equipment, and hiring, and operate it on a nonunion basis until and unless the Union was able to prevail in an NLRB election. I find this to be no more than a candid explanation of the Respondent's lawful intentions.

I credit the testimony of Applegate, and find that he did not make the statements attributed to him by Woodall. Applegate appeared to be a credible witness. Moreover, Woodall's testimony on direct examination and his affidavit submitted to the Board were inconsistent in material respects. Thus, it is clear that, in July or early August, the time of the alleged conversation, the Respondent had not "shut this plant down some time ago and laid off all the employees." Rather, the record conclusively shows that at the time of the alleged conversation the plant was still operating and no employees had been laid off. Further, I credit Applegate regarding the

cryptic conversation of February 1, 1982, which strongly indicates that the union representatives were attempting, at the least, to cause the Respondent's representatives to make admissions against interest.

On the basis of the foregoing, I find that the evidence is insufficient to demonstrate that the Respondent's refusal to even consider hiring any of the predecessor's employees was discriminatorily motivated, and I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated the Act as alleged.

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁶

The complaint is dismissed in its entirety.

⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.